BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Own Motion to Assess and Revise the New Regulatory Framework for Pacific Bell and Verizon California Incorporated.	Rulemaking 01-09-001 (Filed September 6, 2001)
Order Instituting Investigation on the Commission's Own Motion to Assess and Revise the New Regulatory Framework for Pacific Bell and Verizon California Incorporated.	Investigation 01-09-002 (Filed September 6, 2001)

COMMENTS OF THE DIVISION OF RATEPAYER ADVOCATES ON THE DRAFT DECISION OF ADMINISTRATIVE LAW JUDGE KENNEY PROPOSING TO CLOSE THE PROCEEDING AND CANCELLING THE REHEARING OF DECISION (D.) 03-10-088 ORDERED BY D.04-07-036 AND D.04-12-024

Pursuant to Rules 77.2 and 77.3 of the Commission's Rules of Practice and Procedure, the Division of Ratepayer Advocates (DRA) submits these comments on the Draft Decision of Administrative Law Judge Kenney (Draft Decision) mailed on April 24, 2006.[1] In his Draft Decision, ALJ Kenney proposes to close the above-captioned docket without resolving outstanding issues. For reasons set forth below, DRA urges the Commission to resolve several outstanding issues before closing this docket, as DRA and the public interest will be prejudiced if these matters are not resolved.

[1] The Division of Ratepayer Advocates appeared in this proceeding previously as the Office of Ratepayer Advocates. Pursuant to Public Utilities Code section 309.5, effective January 1, 2006, ORA has been renamed, and henceforth shall use the name "Division of Ratepayer Advocates" for all purposes.

I. THE COMMISSION MUST RESOLVE TWO CONFLICTING STANDARDS FOR UTILITY DISCOVERY REQUESTS

In the Draft Decision, ALJ Kenney proposes *not* to address an outstanding DRA *Motion for Partial Reconsideration (Motion)* filed February 18, 2003 pertaining to discovery. The rationale offered in the Draft Decision is simply this: "DRA's motion is moot, as there is no longer a need for discovery in this proceeding because of today's decision to close the proceeding".[2] With all due respect, DRA begs to differ. The matter is not moot, and most certainly, the discovery practices in which then-SBC (now AT&T) engaged were extraordinarily burdensome on DRA, and were inconsistent with long-standing Commission discovery practice.[3] The law on which SBC relied in asserting its right to employ the contested approach to discovery is inapplicable. And the facts on which the Law and Motion ALJ relied in issuing her ruling were in error.[4]

In short, the Law and Motion Ruling of January 29, 2003 in this proceeding has left a specter over DRA for the foreseeable future. If the Commission does not address here the issues raised in DRA's February 18, 2003 *Motion for Partial Reconsideration*, in future proceedings, DRA very likely will be subject to the identical disruptive "discovery" tactics SBC employed here. DRA beseeches the Commission to address this issue now.

A. Background

The fundamental issue in the discovery dispute between DRA and SBC was extremely simple – at what point in the pre-hearing period is a party entitled to conduct detailed, extensive discovery regarding an opposing party's position *as it will be presented in pre-hearing testimony and at hearing*? It has long been the practice at this

[2] Draft Decision, p. 6.

[3] DRA is *acutely* aware that the Commission has no formal discovery rules on which DRA, or any party, can rely. Rather, there exists a discovery practice with which Commission in-house counsel, as well as counsel representing utilities and other parties are very familiar. SBC's actions in this case differed *wildly* from that practice, and the Commission's tolerance of SBC's behavior in this case is unfathomable.

[4] DRA's *Motion* explains in considerable detail the basis for DRA's request that the Commission examine the issues raised. We will not repeat all of those arguments here, but refer the Commission to the February 18, 2003 *Motion* for further explication of those issues.

agency that parties prepare and serve their pre-hearing *written* testimony at some point well in advance of the hearing date(s). Between the date that testimony is served, and the first day of hearing, parties can and do engage in discovery pertaining to the positions each party has set forth in its testimony.

In this case, SBC decided to seek discovery from DRA *prior to* DRA's serving of pre-hearing testimony. Indeed, during the critical period in which DRA was preparing its testimony, SBC propounded numerous detailed, comprehensive discovery requests pertaining to positions DRA *had not yet articulated*. The details of those requests and DRA's attempts to respond to them are set forth in the February 18, 2003 Motion for Partial Reconsideration, and we will not repeat them in these comments.[5] The fundamental point here, however, is that SBC's repeated and burdensome requests for discovery *before* DRA had developed a position was not just highly irregular; it was a tactic designed to distract DRA from devoting its full attention to the development of a position and the preparation of pre-filed testimony to convey that position. The Commission should not countenance SBC's discovery antics. Here and now the Commission has the very best opportunity to make clear that the tactics SBC employed shall not be allowed. Resolution of this issue is especially important in light of the fact that another ALJ in another docket issued a contrary ruling.

B. ALJs Have Rendered Conflicting Rulings In Two Proceedings

As noted in DRA's February 18, 2003 Motion, in A.02-05-004, a Southern California Edison (Edison) general rate case proceeding, Edison moved to compel responses to data requests served on The Utility Reform Network (TURN). In that case also, Edison propounded its data requests *prior to* TURN's serving of pre-filed testimony on other parties. In that docket, the presiding ALJ ruled the opposite way on Edison's Motion to Compel discovery responses from TURN, stating that "I find that TURN is not required to respond to the additional data requests cited in its motion until such time as it

[5] *See Motion*, p.2.

serves its testimony".[6] The ALJ granted Edison leave to refile its data requests on condition that "Edison must make a good-faith effort to actually review that testimony and base its data requests pertaining to that testimony on that review".[7]

The Commission has now before it contradictory outcomes on the same discovery issue set forth in section I.A of these comments – whether a party may conduct discovery against an opposing party before the opposing party has even developed a position and put that position into written testimony. The parties to this proceeding as well as other parties who regularly practice before this agency need to know what the rule of thumb is, and at present, there appears to be one rule for SBC and another for Edison. The Commission should resolve this split result from different ALJs in two dockets.

C. The Law And Motion ALJ Based Her Ruling In Part On An Erroneous Assumption

In her oral ruling, issued at hearing on January 29, 2003, ALJ Sarah Thomas stated that she was disinclined to adopt a blanket rule. She cited two reasons for her decision, and those are addressed at length in the DRA *Motion for Partial Reconsideration*.[8] We wish to highlight here, however, our response to the ruling on one point in particular.

> In her oral ruling, ALJ Thomas expressed her opposition to a "blanket rule". [O]ftentimes, a party that's filed a protest knows what its contentions are because they're in the protest and [the opposing party is] simply asking for the factual basis of those contentions in discovery. And I don't think that should have to wait until after testimony is served.
>
> Oftentimes, the testimony is simply a duplication of what's in the protest or an expansion upon it. So I'm opposed to a general rule".[9]

First, ALJ Thomas' statement was factually incorrect. DRA had *not* filed a protest to an application in this proceeding. The proceeding is a *rulemaking*, as evidenced by the docket number. SBC did not file an application, and thus, there was no procedural

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[6] *See Motion*, p. 7, citing reference to A.02-05-004, volume 12 of the Reporter's Transcript, p. 551.

[7] *Id.*, Reporter's Transcript pp. 551-52.

[8] *See Motion*, pp. 3-6.

[9] Hearing Transcript, pp. 3022-3023.

opportunity for DRA to file a protest. Prior to the preparation of its pre-filed testimony, DRA had *no other* procedural opportunity to set forth its position in response to SBC's position. Indeed, the very purpose of serving pre-hearing testimony is to afford parties the opportunity to set forth a position with which other parties may then agree or disagree. It is critical for the Commission to recognize that DRA had not taken any public position on the issues raised in the rulemaking at the moment that SBC began its burdensome, disruptive discovery tactics.

It is equally vital that the Commission recognize DRA's role in proceedings before this agency. DRA's role is *not* analogous to that of a party in a civil case.[10] As a branch of the Commission's staff, DRA reviews, analyzes, and responds to the case or cases utilities make. In so doing, DRA is utterly dependent on the utility or utilities as the source(s) of the raw data and empirical material that serves as a foundation for DRA's testimony.

Further, it is for the very reasons ALJ Thomas stated in her Law and Motion Ruling that the Commission must address this issue now. ALJ Thomas declined to create a "blanket rule" for her stated reasons. The clear implication of her determination not to create a blanket rule prohibiting the propounding of discovery prior to the parties' serving of pre-hearing testimony is that ALJ Thomas has created a *de facto* rule representing the opposite – parties now have a right to conduct discovery before any party has set forth a written position in any given proceeding. In the absence of a statement from the Commission on this question, the Thomas ruling may serve as a precedent parties may rely on in future proceedings.[11] The Commission should strike down this *de facto* rule now, before it becomes standard practice and further inhibits DRA's participation, and that of other parties, in Commission proceedings.

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[10] It is precisely because DRA is not like a party in a civil case, and proceedings before this agency are not like civil trials, that the Civil Discovery Act is inapplicable here, notwithstanding SBC's claim to the contrary. *See Motion*, pp. 7-8.

[11] This again raises the problem cited in section X.B, *i.e.*, that two ALJs have rendered contradictory rulings in different Commission dockets, each creating a precedent. The Commission should resolve this difference and provide clarity to all parties.

II. THE COMMISSION SHOULD RETAIN THE ABILITY TO REVIEW AT&T'S AND VERIZON'S SERVICE QUALITY

The Draft Decision states that the NRF proceeding has been superseded by the URF proceeding.[12] The NRF Review process for AT&T and Verizon provided the Commission with a valuable procedural tool that protected 95% of the consumers of this state by ensuring quality telephone service. Phase 3B of the Fourth Triennial Review would have addressed the maintenance and improvement of AT&T's and Verizon's service quality and developed policies that would "…prevent future violations of service quality statutes, rules, and orders without making it necessary for parties to pursue lengthy formal complaint processes."[13] If NRF is eliminated, the Commission will lose this important vehicle for reviewing the maintenance and improvement of AT&T's and Verizon's service quality.

Given the fact that AT&T and Verizon own the vast majority of access lines in this state, the safety and welfare of California depends on the extent to which their respective networks and service operations function, and how well they function.[14] It is critical that AT&T and Verizon be required to provide good service quality, and it is the obligation of the Commission, assisted by DRA, to review and confirm their service quality. Not only is ensuring service quality important today, it will play an even more important role in the competitive market in the future. AT&T and Verizon set the standard for the telecommunications industry in this state, and other carriers likely will attempt to meet or perhaps exceed those same standards in order to compete. Indeed, competition itself is dependent on AT&T's and Verizon's service quality because competitors interconnect with these carriers and/or resell their service.

Poor to lackluster service performance by Verizon and/or AT&T in the past indicates that special oversight is needed in the area of service quality. For example, the last NRF review for AT&T and Verizon included a close review of service quality. Once

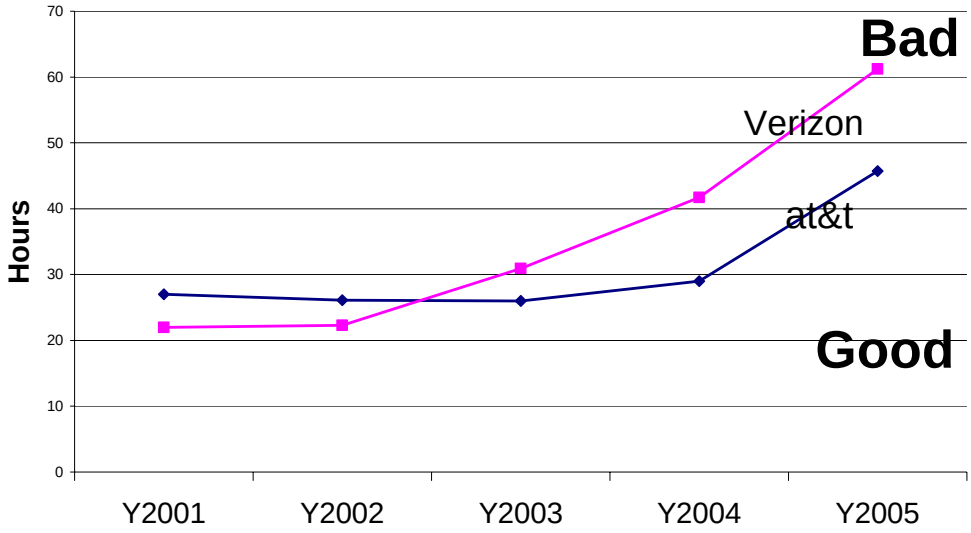
[12] Draft Decision, Conclusion of Law 1.

[13] D. 03-10-088 pp. 157, 158)

[14] Although many customers also use wireless service, subscribers to wireless service overwhelmingly retain their wire line carrier.

that period of scrutiny was completed, repair intervals increased dramatically, as the following chart shows.

Residential Initial Out of Service Intervals
Source: ARMIS



In addition, the Commission has previously concluded that "SBC CA Bell has exhibited a pattern of regulatory compliance during periods of special oversight, only to be followed by noncompliance in furtherance of SBC CA's revenue goals when the special oversight ends."[15] AT&T has been fined millions in penalties and reparations, including a case in which the Commission found that its marketing practices were "…inconsistent with reasonable service quality."[16] Verizon has also engaged in activity the Commission has determined to constitute marketing abuse. (D.98-12-084 [17])

[15] D.01-09-058, as modified by D.02-02-027.

[16] SBC (now AT&T) misled consumers and was fined $15 million for marketing abuses and poor service quality. The Commission found that its marketing practices were "…inconsistent with reasonable service quality."(D. 01-09-058) In another case the Commission levied against Pacific the largest fine ever paid by a public utility, $27 million for over-billing for DSL charges. (D.02-10-073)

[17] The Report of the Consumer Services Division Investigation into GTEC's1992 Marketing Abuse Allegations, prepared by outside consultants, found that GTEC directors, attorneys, and managers "…failed to disclose material information to the CPUC about the history of sales fraud at the LAC, and GTEC did not produce all relevant, requested documents in the CPUC 1992 investigation of the LAC." The Commission approved a settlement agreement in D.98-12-084, which required GTEC to pay a total of $13 million (including the original $3.2 million) to the State's General Fund, the Telecommunications Consumer Protection Fund, and to the CPUC Fiscal Office as reimbursement for the CSD's investigative and other costs.

Further, if the Commission decides to significantly modify or eliminate NRF, the Commission also should rescind the NRF Service Quality decision. A potential elimination of NRF likely would reduce the Commission staff's ability to obtain service quality data from SBC/AT&T and Verizon. It has been DRA's experience that outside of the NRF review, or other ongoing proceedings, DRA has encountered considerable difficulty in obtaining service quality information from SBC/AT&T. The NRF service quality review procedure reduced this problem by providing DRA staff with expanded access to company service quality statistics (which are vital to monitor and track performance).

Based on this past experience, DRA strongly recommends that the draft decision be modified to include the requirement that the Commission vigorously monitor the overall service quality of AT&T and Verizon to adequately protect the consumers of this state.[18]

III. CONCLUSION

For the reasons set forth in these comments, the Commission should not close this docket without resolving several outstanding issues, as noted.

Respectfully submitted,

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May 15, 2006

[18] *See* Public Utilities Code Section 709(a), which contains DRA's mandate from the Legislature to promote "high quality telecommunications service to all Californians."

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of **"COMMENTS OF THE DIVISION OF RATEPAYER ADVOCATES ON THE DRAFT DECISION OF ADMINISTRATIVE LAW JUDGE KENNEY PROPOSING TO CLOSE THE PROCEEDING AND CANCELLING THE REHEARING OF DECISION (D.) 03-10-088 ORDERED BY D.04-07-036 AND D.04-12-024"** in **R.01-09-011 and I.01-09-002** by using the following service:

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Executed on the **15th** day of **May, 2006** at San Francisco, California.

/s/ Rebecca Rojo

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Rebecca Rojo

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